Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 92-498

In the Matter of	)	
	)	
Implementation of Section 10 of the Cable Consumer Protection and and Competition Act of 1992	)	**MM Docket No. 92-258**
	)	
	)	
Indecent Programming and Other Types of Materials on Cable Access Channels	)	

NOTICE OF PROPOSED RULE MAKING

Adopted: November 5, 1992; **Released:** November 10, 1992

Comment Date: December 7, 1992

Reply Comment Date: December 21, 1992

By the Commission:

Introduction

1. On October 5, 1992, Congress enacted a comprehensive cable television bill, the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992"), Pub. L. 102-385, which substantially alters existing provisions of the Communications Act that govern cable television. Generally, the Communications Act prohibits cable operators from exercising editorial control over the access channels on their systems.[1] Section 10 of the new Act, however, permits cable operators voluntarily to prohibit indecent programming on the leased access channels on their systems. Section 10 also requires, inter alia, the Commission to adopt regulations that (1) are designed to restrict access by children to indecent programming on leased access channels of cable systems and (2) enable cable operators to prohibit use of channel capacity on the public, educational, or governmental access channels ("PEG channels") for programming which contains obscene material, sexually explicit conduct, or material

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[1] See section 611(e) of the Communications Act applicable to the public, educational, and governmental access channels and section 612(c)(2) of the Act applicable to commercial leased access channels.

soliciting or promoting unlawful conduct.

2. Section 10 of the new Act also amends section 638 of the Communications Act (47 U.S.C. §558), which immunizes cable operators from liability for programming on access channels, by adding at the end of it "unless the program involves obscene material." Thus, if a program is obscene, a cable operator is no longer statutorily immune from liability for programs carried on the PEG or leased access channels of its system.[2] This particular amendment becomes effective without further action by the Commission on December 4, 1992, i.e., 60 days after the new Act's enactment.[3]

3. The purpose of this proceeding is to seek comment on the provisions discussed above that require implementing regulations. In the paragraphs below, we discuss in detail the statutory provisions and our proposals for implementation.

Leased Access Channels--Voluntary Prohibitions by Cable Operators

4. Section 10 amends section 612(h) of the Communications Act, 47 U.S.C. §532(h), relating to cable leased access, to permit a cable operator to enforce a "written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." This provision allows a cable operator, if it chooses, to exclude from leased access channels any programming that the operator "reasonably believes" is indecent.[4] This statutory description of indecency in this section is analogous to the Commission's definitions of indecency that have been applied in both the broadcast and common carrier telephone context and that have been upheld by the courts. See Dial Information Services v.

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[2] Section 639 of the Communications Act, 47 U.S.C. §559, and 18 U.S.C. §1468 prohibit obscene matter on cable systems.

[3] Section 15 of the new Act, which relates to the provision of unsolicited sexually explicit programs on "premium channels" that are offered as part of a cable subscriber promotional effort, also becomes effective 60 days after enactment. See FCC Public Notice "Self-Effectuating Provisions of the Cable Television Consumer Protection and Competition Act of 1992" (released November 5, 1992). That section amends section 624(e) of the Communications Act by requiring that cable operators provide 30 days advance notice to subscribers regarding channels that offer X, NC-17, or R rated movies and to block these channels upon subscriber request.

[4] See 138 CONG. REC. S646 (daily ed. January 30, 1992).

Thornburgh, 938 F.2d 1535 (2d Cir. 1991), cert. denied, 112 S. Ct. 966 (1992) and Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988). This statutory authority is self-executing and, therefore, a cable operator's authority to prohibit on leased access channels programming it reasonably believes to be indecent becomes effective on December 4, 1992.

Leased Access Channels--Indecent Matter Required To Be Blocked

5. Section 10 of the new Act also amends section 612 of the Communications Act of 1934 (47 U.S.C. §532) by adding a new subsection (j). Subsection (j)(1) requires the Commission to promulgate regulations within 120 days of the date of enactment of that subsection designed to:

> limit the access of children to indecent programming, as defined by Commission regulations, and which cable operators have not voluntarily prohibited under subsection (h) by --
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> (A) requiring cable operators to place on a single channel all indecent programs, as identified by program providers, intended for carriage on channels designated for commercial use under this section;
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> (B) requiring cable operators to block such single channel unless the subscriber requests access to such channel in writing; and
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> (C) requiring programmers to inform cable operators if the program would be indecent as defined by Commission regulations.

Subsection (j)(2) provides that cable operators are required to "comply with the regulations promulgated pursuant to paragraph (1)."

6. We seek comment on the best way to effectuate these provisions. At the outset, we address the definitional issue posed by the new law. Under section 10, cable operators are required to block indecent programming "as defined by Commission regulations." Thus, Congress has left to the Commission the task of defining "indecent programming" for the purpose of implementing the above provision. Congress, however, has provided guidance to us by including a description of indecent programming in that part of Section 10 that permits cable operators, if they so choose, to exclude this type of programming on cable leased access on their systems. As noted earlier, this language is strikingly similar to the Commission's definitions of indecency that have been applied

to broadcasting and the telephone medium.[5] We propose, therefore, to track the definitional language used by Congress in the first part of section 10 which refers to programming "that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards."

7. In proposing a definition of indecent programming, we note that the Supreme Court in FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978), has stated that "each medium of expression presents special First Amendment problems." In light of this statement, we invite comment on whether we should state in this definition that the "community standards" test to be used is one which applies to the cable medium. We note that, in analogous areas, we have tailored our indecency definitions for broadcast programming and telephone communications to the standards applicable to those particular media. It is our intention to faithfully execute the provisions of the statute and, in this regard, we seek comment on how we may do so and also ensure that the statute is implemented in the most constitutionally permissible manner.

8. As set out above, section 10 specifically requires cable operators to place all indecent programming on a single leased access channel and to block access to that channel unless the subscriber requests access in writing. Thus, unlike recently enacted legislation aimed at regulation of indecent programming on broadcast stations,[6] this legislation does not compel cable operators to prohibit indecent leased access programming during a specified period of the day. Instead of this type of "safe harbor" approach, it mandates a "blocking" approach similar in some respects to that contained in section 223 of the Act applicable to providers of indecent communications over common carrier telephone facilities. The explicit references in the legislative history to the "blocking" approach under section 223 reinforces that this type of regulation was deliberately chosen over the "safe harbor"

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[5] See Infinity Broadcasting Corp., 3 FCC Rcd 930, 936 n.6 (1987), remanded on other grounds sub nom. Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988) and Dial Information Services v. Thornburg, 938 F.2d 1535, 1540-41 (2d Cir. 1991).

[6] Just recently, we issued a rulemaking notice to implement the Public Telecommunications Act of 1991, Pub. L. No. 102-356 (August 26, 1992), which, inter alia, requires the Commission to issue regulations that would prohibit the broadcast of indecent programming between 6 a.m. and 12 midnight on commercial broadcast stations (6 a.m. and 10 p.m. for certain public broadcast stations). Notice of Proposed Rule Making in GC Docket No. 92-223 (Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. §1464), FCC 92-445, ____ FCC Rcd ____ (released October 5, 1992).

approach that applies on the broadcast side.[7]

9. In essence, under section 10, children's exposure to indecent programs is effectively eliminated unless access to that leased access channel service is specifically requested in writing by the cable subscribing household. Our proposed regulations would codify these statutory requirements by requiring that cable operators place all programming identified as indecent on a single leased access channel, employ appropriate blocking mechanisms, and permit access only if the subscriber so requests in writing. Commenters should provide any relevant suggestions or comments concerning appropriate blocking mechanisms and procedures relating to subscriber access. We also seek comment on our interpretation that, under section 624(d)(2)(A) of the Communications Act, cable operators would still be required to provide a "lock box," upon request, to a subscriber who has specifically requested access to this channel.[8] It is our tentative view that Congress did not mean to preclude a person's right under that section to obtain a lockbox to control access to other cable services on the system or to limit access to this channel to others in the household.

10. Under section 10 it is the program provider, not the cable operator, who must determine if a program is indecent and, hence, must be provided on the blocked channel. Because the cable operator is prohibited under section 612(c)(2) of the Communications Act from exercising editorial control over the leased access channels (unless under the new Act it enforces a written and published policy that prohibits indecent programming),[9] it would appear that the cable operator has no power to require that indecent programming be carried on the blocked channel if the program provider does not identify the program as indecent and so inform the cable operator.[10] We seek comment upon whether the above construction of the statute is correct and, if not, the reasons therefor.

11. We also seek comment on whether the cable operator, consistent with section 612(c)(2)'s no censorship provision and

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[7] See 138 CONG. REC. S646-49 (daily ed. January 30, 1992).

[8] As described in section 624(d)(2), a "lockbox" or parental key is a device that enables subscribers to prohibit viewing of particular cable services within their homes during periods selected by them.

[9] See para. 4, supra.

[10] See section 612(c)(2) which, noted earlier, generally prohibits the cable operator from exercising editorial control over these channels.

with the new amendments under section 10, can require program providers to certify that their programming is not obscene or indecent (as defined by Commission regulations). We assume that cable operators who have a written and published policy of prohibiting indecent material may require such certifications. In view of cable operators' potential liability for carriage of obscene materials, we also assume that all cable operators can require program providers to certify that their programs do not contain obscene materials.

12. Finally, as the statute expressly provides, programmers must inform cable operators if the material sought to be presented on a leased access channel of the system would be indecent as defined by Commission regulation. In order to comply with the single channel requirement, it is evident that cable operators must receive adequate advance notice in order to have sufficient time to channel such programming on their systems. We seek comment on what would be a reasonable time frame for the required notification by a program provider to the cable operator and on whether such notification should be made in writing. We also ask commenters to address whether a cable operator should be held harmless from liability under our proposed rules if it does not receive any, or timely, notification from a programmer. We also seek comment on any other requirements that should be adopted in order to effectuate the new law's provisions. For example, commenters should address whether a cable operator should be required to retain notifications for a prescribed period of time. We also invite commenters to bring to our attention any other matters not discussed in this notice that they believe have an important bearing on the Commission's proposed implementation of the statute.

Public, Educational, and Governmental Access Channels -- Cable Operator-Imposed Prohibitions on Certain Types of Programming

13. Section 10 requires the Commission to promulgate within 180 days of the enactment of the Act regulations that enable a cable operator to prohibit the use of any public, educational, or governmental access facility "for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct."[11] This section does not require the cable operator to refuse carriage of such programming on these channels but merely allows the cable operator the option of

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[11] The Senate drafters of this provision appear to have used the term programming involving "sexually explicit" conduct to mean the same types of indecent programming material that may be prohibited by cable operators on leased access channels. See 138 CONG. REC. S646 (daily ed. January 30, 1992). The Senate drafters also indicated that the provision relating to "material soliciting or promoting unlawful conduct" was intended to address programming that solicits prostitution. Id. at S649.

prohibiting such programming.[12] As pointed out earlier, however, the newly-amended section 638 of the Act expressly provides that cable operators are no longer statutorily immune from liability for carriage of obscene materials on these channels.[13]

14. We propose to codify in our rules the authority afforded to cable operators under this new statutory provision. One mechanism that a cable operator might use to enforce a policy of prohibiting this programming would be to require certifications by users or operators that no materials fitting into any of these statutory categories will be presented on these channels. We request comment on this approach. Commenters should also address whether our regulations should provide for any additional matters not expressly addressed in the statute. For example, commenters may wish to address whether specific procedures should be developed to govern disputes between the cable operator and programmer of these access channels. Because these channels are mandated and their conditions of use are defined at the local level, we propose that any such disputes should be handled at the local level. We invite interested persons to comment on these and any other aspects that they believe would be germane to proper implementation of this provision.

15. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed pursuant to the Commission's rules. See 47 C.F.R. §§1.1202, 1.1203 and 1.1206(a). Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comment on or before December 7, 1992, and reply comments on or before December 21, 1992. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting material. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

16. As required by section 603 of the Regulatory Flexibility Act (Pub. L. No. 96-353, 94 Stat. 1164, 5 U.S.C. §601 et seq.

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[12] As noted para. 1, supra, section 611(e) of the Communications Act restricts the cable operator from exercising editorial control in other respects.

[13] See para. 2, supra.

(1981), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. The comments must be filed in accordance with the same filing deadlines as comments on the rest of this Notice of Proposed Rule Making, but they must have a separate and distinct heading, designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with section 603(a) of the Regulatory Flexibility Act.

17. Authority for this proceeding is contained in sections 4(i), 4 (j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), and 303(r) and section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385 (1992).

18. Further information on this proceeding may be obtained by contacting Stephen A. Bailey, Office of General Counsel, at (202) 254-6530.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy

Donna R. Searcy
Secretary

APPENDIX A

PROPOSED RULE

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation of Part 76 is amended to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085; 47 U.S.C. §§ 152, 153, 154, 301, 303, 307, 308, 309; Secs. 611, 612, ___ Stat. ___, 47 U.S.C. §§ 531, 532

2. Subpart ___ is amended by adding the following new section:

§76.____ Restrictions on Indecent Programming on Leased Access Channels; Restrictions on Obscene Materials and and Other Types of Materials on Public, Educational, and Governmental Access.

(a) A cable operator may enforce prospectively a written and published policy of prohibiting on leased access channels programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium.

(b) All programs intended for carriage on channels designated for commercial leased access use under this section and identified by the program provider as indecent shall be placed on a single channel, except for such programs prohibited by the cable operator pursuant to paragraph (a) above. A cable operator shall block such channel except for subscribers requesting access to such channel in writing.

(c) Program providers on leased access channels shall identify for cable operators no later than seven days prior to the requested carriage any programming that describes or depicts sexual or execretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium.

(d) A cable operator may prohibit the use of any channel capacity on the cable system of any public, educational, or govermental access facility for any programming that contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.

APPENDIX B
INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action.

This proceeding is being initiated in order to seek comment on the best way to implement section 10 of the Cable Consumer Protection and Competition Act of 1992, Pub. L. 102-385, relating to indecent programs on leased access channels of a cable system and to cable operator restrictions on certain programs on public, educational, and governmental access channels.

Objectives.

The Commission's goal is to provide notice and opportunity to comment to members of the public regarding efficacious implementation of section 10 of the new Act.

Legal Basis.

Authority for this proposed rule making is contained in sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 303(r) and section 10 of the Cable Consumer Protection and Cometition Act of 1992, Pub. L. 102-385 (1992).

Reporting, Recordkeeping and other Compliance Requirements

The Commission is asking for comment on whether cable operators shall be required to retain any notifications made by program providers that the program they seek to present on the cable system's leased access channels is indecent.

Federal Rules that Overlap, Duplicate or Conflict with Proposed Rule.

None.

Description, Potential Impact, and Number of Small Entities Involved.

The rules proposed in this proceeding would impose new burdens on all cable operators, including smaller ones, by requiring them to channel indecent programs on leased access to a single channel but would also enable operators to exercise more control over the content of public, educational, and governmental access channels to the extent they involve programs which contain obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives.

None.